108

No. (1)

Supreme Court, U.S.
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In The

# Supreme Court of the United States

IN RE: JOHN V. DOMMISSE,

*Petitioner.*

**On Petition For Writ Of Mandamus To The Supreme Court Of The State Of Arizona**

## PETITION FOR WRIT OF MANDAMUS

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## QUESTIONS PRESENTED FOR REVIEW

1.) Can a medical practitioner's license be revoked in a civil action instead of a quasi-criminal action?

2.) Can a medical practitioner's license be revoked under a standard of review of a mere preponderance of the evidence instead of clear and convincing evidence?

3.) Is there a violation of Due Process of Law when a citizen is discriminated against by a government agency that does not follow previously-mandated procedures by higher authorities?

4.) Is there a violation of Equal Protection under the Law when a citizen is discriminated against by a government agency that does not follow previously-mandated procedures by higher authorities?

## PARTIES TO THE PROCEEDING

The Parties to the proceeding are:

Petitioner – John V. Dommisse

Respondents – Arizona Medical Board
Lisa Wynn, Executive Director

Administrative Law Judge
Diane Mihalsky,
Office of Administrative Hearings

Cliff J. Vanell, Director,
Office of Administrative Hearings

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TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED FOR REVIEW | i |
| PARTIES TO THE PROCEEDING | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF AUTHORITIES | iv |
| CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL PROVISION INVOLVED IN THE CASE | 1 |
| STATEMENT OF THE FACTS | 1 |
| STATEMENT OF THE ISSUES | 2 |
| STATEMENT OF RELIEF SOUGHT | 3 |
| REASONS WHY THE WRIT SHOULD ISSUE | 3 |
| CONCLUSION | 15 |

APPENDIX

Order from the Supreme Court of the State of Arizona ..... App. 1

# TABLE OF AUTHORITIES

Page

CITATIONS

*Addington v. Texas*, 551 U.S. 418 (U.S.Tex. 1979) ..... 11

*Alexander v. Witman*, 114 F.3d 1392 (3rd Cir. 1997), cert. denied, 118 S.Ct. 367, 139 L.Ed.2d 286 (U.S. 1997) ..... 12

*Allen v. Louisiana Bd. of Dentistry*, 531 So. 2d 787 (La. Ct. App. 1988), rev'd on other grounds, 543 So. 2d 908 (La. 1989) ..... 9

*Anonymous v. The State Board of Examiners*, 473 S.E.2d 870, 323 S.C. 260 (S.C. App., 1996) ..... 7

*Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) ..... 15

*Boyd v. United States*, 116 U.S. 616 (U.S. 1886) ..... 11

*Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 68 S.Ct. 1039, 92 L.Ed. 1403 (1948) ..... 4

*Buckley v. Valeo*, 424 U.S. 1 (1976) ..... 14

*Casey v. Planned Parenthood*, 14 F.3d 848 (3rd Cir. 1994) ..... 3

*City of Okoboji v. Iowa District Court for Dickson County*, No. 130/06-1483 (2008) ..... 4

*Clark v. West Virginia Bd. of Med.*, 508 S.E.2d 111 (W. Va. 1998) ..... 10

TABLE OF AUTHORITIES – Continued

Page

*Cooper v. Aaron*, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d (1958) ..... 8

*Cooper v. Bd. of Profl. Discipline*, 4 P.3d 561 (Idaho 2000) ..... 9

*Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) ..... 14

*Davis v. Wright*, 503 N.W.2d 814 (Neb. 1993) ..... 9

*Ettinger v. Board of Medical Quality Assurance*, 135 Cal. App. 3d 853 (Cal. App. 2 Dist., 1982) ..... 7

*F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 40 S.Ct. 560, 64 L.Ed. 989 (1920) ..... 13

*Federal Communications Commission v. Beach Communications, Inc.*, 508 U.S. 307, 113 S.Ct. 2096 (1993) ..... 13

*Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) ..... 6, 11

*Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959) ..... 6, 11

*In re Robson*, 575 P.2d 771 (Alaska 1978) ..... 9

*In re Ruffalo*, 390 U.S. 544 (U.S.Ohio 1968) ..... 11

*In re Zar*, 434 N.W.2d 598 (S.D. 1989) ..... 9

*International House v. N.L.R.B.*, 676 F.2d 906 (1982) ..... 10

*JLRB v. Welcome-American Fertilizer Co.*, 443 F.2d 19 (9th Cir. 1971) ..... 10

TABLE OF AUTHORITIES – Continued

Page

*Litman v. Mass. Mut. Life Ins. Co.*, 825 F.2d 1506 (11th Cir. 1987).....4

*Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (U.S.Va. 1976).....11

*McFadden v. Mississippi Bd. of Licensure*, 735 So. 2d 145 (Miss. 1999).....9

*Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923).....15

*Miller v. U.S.*, 868 F.2d 236 [C.A.7 (Ind.), 1988].....4

*Nelson v. I.N.S.*, 232 F.3d 258 (1st Cir. 2000).....9

*New York City Transit Authority v. Beazer*, 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979).....13

*Nguyen v. Department of Health*, 144 Wn.2d 516, 29 P.3d 689 (WA 2001).....7

*Ongom v. State of Washington*, En Banc No. 76618-5 (2006).....6, 8

*Ongom v. Washington State Dept. of Health*, 148 P.3d 1029 (Wash. 2006).....7

*Painter v. Abels*, 998 P.2d 931 (WY 2000).....7

*Pembina Consol. Silver Mining & Milling Co. v. Com. of Pennsylvania*, 125 U.S. 181 (1888).....12

*Perri v. Director, Dept. of Corrections of Ill.*, 817 F.2d 448 (7th Cir. 1987).....5

TABLE OF AUTHORITIES – Continued

Page

*Planned Parenthood of Southeastern Pennsylvania v. Casey v. Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. 833, 112 S.Ct. 2791 (1992) ..... 14

*Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) ..... 13

*Schireson v. Walsh*, 187 N.E. 921 (Ill. 1933) ..... 9

*Schweiker v. Wilson*, 450 U.S. 221, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981) ..... 13

*Service v. Dulles*, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957) ..... 9

*Silva v. Superior Ct.*, 14 Cal. App. 4th 562, 17 Cal. Rptr. 2d 577 (1993) ..... 9

*Storrs v. State Med. Bd.*, 664 P.2d 547 (Alaska 1983) ..... 9

*Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 103 S.Ct. 1343, 75 L.Ed.2d 260 (1983) (per curiam) ..... 5

*Tuskowski v. Griffin*, 359 F. Supp. 2d 225 (D. Conn. 2005) ..... 13

*United States v. Heffner*, 420 F.2d 809 [C.A.4 (Md.) 1970] ..... 8

*United States v. Ward*, 448 U.S. 242 (U.S.Okl. 1980) ..... 11

*United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954) ..... 8

TABLE OF AUTHORITIES – Continued

Page

*U.S. ex rel. Shore v. O'Leary*, 833 F.2d 663 (7th Cir. 1987) ..... 4, 5

*Upton v. S.E.C.*, 75 F.3d 92 (C.A.2 1996) ..... 6

*Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) ..... 6

*Washington State Department of Health v. Ongom*, 127 S.Ct. 2115 (2007) ..... 6, 7, 9

*Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) ..... 14

*Woodby v. INS*, 385 U.S. 276 (U.S.N.Y. 1966) ..... 11

CONSTITUTION, STATUTES AND RULES

Fifth Amendment, U.S. Constitution ..... 1, 3, 8, 13

Fourteenth Amendment, U.S. Constitution ... 1, 3, 13, 14

28 U.S.C. § 1651(a) ..... 1

U.S. Supreme Court Rule 20 ..... 1

## CITATIONS OF REPORTS OR OPINIONS ENTERED IN THE CASE

The Arizona Medical Board (AMB), the Maricopa County Administrative Court and the Superior Court of Arizona Orders denied Petitions for Writ of Mandamus/ Special Action; the Arizona Appellate and Supreme Court Orders Denied Acceptance of Jurisdiction for the Writs/ Special Actions.

## JURISDICTION

This Honorable Court has jurisdiction to issue extraordinary writs under 28 U.S.C. § 1651(a) and U.S. Supreme Court Rule 20, [especially] "in certain narrowly defined circumstances" where extreme violations have occurred.

## CONSTITUTIONAL PROVISION INVOLVED IN THE CASE

The Constitution of the United States of America, Fifth and Fourteenth Amendment rights of due process and equal protection under the law.

## STATEMENT OF THE FACTS

The Petitioner, John V. Dommisse from Tucson, Arizona is a licensed allopathic medical doctor in the AMB-recognized/ -allowed practice area of nutritional

medicine in the State of Arizona. The AMB is in the process of issuing severe sanctions against the Petitioner, including, but not limited to, the taking of his medical license. Appeals were made to the AMB, and its Administrative Court, and the Superior Court of the State of Arizona, which were denied. This Petition for Writ of Mandamus was then filed with both the Appellate and the Supreme Court of Arizona, both of which were denied on jurisdictional grounds, not on the merits of the case.

## STATEMENT OF THE ISSUES

1. Whether the AMB, the Administrative Court, and the Arizona Superior, Appellate, and Supreme Courts erred when they did not rule that Petitioner's case should have had a status of quasi-criminal or in the nature of quasi-criminal.

2. Whether all the five layers of the Arizona Courts erred when they did not rule that Petitioner's case should have had a standard of review or proof of clear, cogent and convincing evidence.

3. Whether all the five layers of the Arizona Courts erred by not considering that Due Process of the Law was violated by the discrimination in this case.

4. Whether all the five layers of the Arizona Courts erred by not considering that Equal

Protection of the Law was violated by the discrimination in this case.

## STATEMENT OF RELIEF SOUGHT

The Petitioner requests and demands that his due process of law and equal protection of the law under the Fifth and Fourteenth Amendments of the U.S. Constitution be respected. This means that the Petitioner is entitled to his case being treated as quasi-criminal or in the nature of quasi-criminal, with a standard of review or proof being clear, cogent and convincing evidence.

## REASONS WHY THE WRIT SHOULD ISSUE

The U.S. Supreme Court has spoken concerning the issues involved in this instant case while it was pending. All five layers of the Courts of the State of Arizona have refused to recognize and/or follow the rulings of the U.S. Supreme Court, in violation of the rule of law.

The Honorable Iowa Supreme Court has spoken on the fundamental rule of law principle that must be applied to this instant case as follows:

> *"It is a fundamental rule of law that a trial court is required to honor and respect the rulings and mandates by appellate courts in a case. See Casey v. Planned Parenthood,* 14 F.3d 848, 856 (3rd Cir. 1994). *The rule is*

> *fundamental to the effective operation of our multitiered judicial system. See Litman v. Mass. Mut. Life Ins. Co.*, 825 F.2d 1506, 1508 (11th Cir. 1987). *It accounts for our orderly system of justice, which in turn contributes in a substantial way to the overall stability of our society. Since its earliest days, the United States Supreme Court recognized that "an inferior court has no power or authority to deviate from the mandate issued by an appellate court." Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 306, 68 S.Ct. 1039, 1040, 92 L.Ed. 1403, 1405 (1948). *City of Okoboji v. Iowa District Court for Dickson County*, No. 130/06-1483 (2008). (Emphasis added.)

Orders of all five layers of the Arizona Courts involved in this case ignore the established principles of law.

> *Stare decisis* –
>
> "The bedrock of stare decisis is that lower courts are bound by the precedential authority of cases rendered by higher courts. *U.S. ex rel. Shore v. O'Leary*, 833 F.2d 663 at 667 (7th Cir. 1987). This limitation on judicial power is one of the cornerstones of the legal structure in that it serves broader societal interests such as the orderly and predictable application of legal rules." *Miller v. U.S.*, 868 F.2d 236.
>
> "One foundation block of our judicial system is the principle of *stare decisis*, which demands adherence to precedents. Decisions

> are made in accord with previous authoritative decisions in similar cases emanating from one's own Circuit and from the US Supreme Court. A lower court owes deference to those above it; ordinarily it has no authority to reject a doctrine developed by a higher court. See, e.g., *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535, 103 S.Ct. 1343, 1344, 75 L.Ed.2d 260 (1983) (per curiam); *Perri v. Director, Dept. of Corrections of Ill.*, 817 F.2d 448, 451 n. 4 (7th Cir. 1987)." *U.S. ex rel. Shore v. O'Leary*, supra.
>
> "Needless to say, *only this Court may overrule one of its precedents*. Until that happens [our decision] is the law . . . " (Emphasis added.) *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533.
>
> In this case, what is the legal U.S. Supreme Court precedent concerning whether it is quasi-criminal and has the standard of review of clear, cogent and convincing evidence? It is clearly *not* that this is a civil case with a standard of proof or review of a mere preponderance of evidence, as the Honorable Arizona Courts have ruled in their Orders.

Again, this case should *not* have been a civil action, but a quasi-criminal action against the Petitioner. Referring to Barron's Law Dictionary, "quasi" means nearly, almost, like. Quasi-criminal refers to a proceeding which, though not actually a criminal prosecution, is sufficiently similar in terms of the sanction to be imposed, e.g. civil fine, loss of employment, loss of license, suspension, . . . etc. Thus, where

substantial penalties and sanctions may result, a civil action becomes a quasi-criminal prosecution against the Respondent. *Goldberg v. Kelly,* 25 L.Ed.2d 287; *Greene v. McElroy*, 360 U.S. 474 at 496-497; *Upton v. S.E.C.,* 75 F.3d 92; *Village of Hoffman Estates v. Flipside, Hoffman Estates,* 455 U.S. 489.

In a quasi-criminal prosecution, all of the due process rights must be made available to the Defendant except presentment of the charge to a grand jury. These rights are protected not only in criminal cases, but also in all cases of penal action. *Goldberg*, supra. There was no probable cause to even file a Complaint in this instant case.

A case that involves a quasi-criminal nature has a standard of review of clear, cogent and convincing evidence, and vice-versa. The Supreme Court of the State of Washington in an *En Banc* decision decided that the standard of proof required in *cases deemed quasi-criminal in nature is clear and convincing evidence.* (Emphasis added.) *Ongom v. State of Washington*, En Banc No. 76618-5 (2006). This case and principle was upheld by the United States Supreme Court in *Washington State Department of Health v. Ongom*, 127 S.Ct. 2115, in April 2007.

The United States Supreme Court basically ruled and established the legal precedent that a medical practitioner before his or her medical board, facing a complaint that could remove their license to practice, is in the nature of quasi-criminal and the standard of proof or review is clear, cogent and convincing

evidence. *Washington State Department of Health v. Ongom*, supra.

By the rule of law and legal precedence, the Honorable Arizona Courts are bound by the above decision under the principle of "stare decisis".

Besides the U.S. Supreme Court in *Ongom*, supra, several State Supreme Courts and other courts already ruled concerning the quasi-criminal nature of professional, including physician, regulatory cases, and on the standard of proof or review being clear, cogent and convincing evidence as follows:

> State of California – Court of Appeals; *Ettinger v. Board of Medical Quality Assurance*, 135 Cal. App. 3d 853
>
> State of South Carolina – Court of Appeals; *Anonymous v. The State Board of Examiners*, 473 S.E.2d 870
>
> State of Wyoming – Wyoming Supreme Court; *Painter v. Abels*, 998 P.2d 931
>
> State of Washington – Washington Supreme Court; *Nguyen v. Department of Health*, 144 Wn.2d 516, 29 P.3d 689; *Ongom v. Washington State Dept. of Health*, 148 P.3d 1029

The State of Arizona chose the Common Law of England as the basis of its legal system. Therefore, the above cases have some legal precedent under the Common Law as well.

The Petitioner has provided this Honorable Court with the up-to-date legal precedent that trumps any

old, obsolete court cases. The *Ongom* decision is one, possibly the precedent, law for health care practitioners that the Arizona Courts must follow.

Every state . . . judicial officer is solemnly committed by oath taken pursuant to Art. 6, cl. 3 to support this Constitution. *Cooper v. Aaron*, 358 U.S. 1. The basic principle [is] that the federal judiciary is supreme in the exposition of the law of the Constitution. *Cooper v. Aaron*, supra. The U.S. Supreme Court has ruled in *Ongom* that health care practitioners being sanctioned by their health care regulatory boards have a Constitutional right of due process under the Fifth Amendment *to have their case status be in the nature of quasi-criminal and the standard of review or proof be clear, cogent and convincing evidence.* The U.S. Supreme Court has spoken and the Honorable Arizona Courts must follow.

Once again, since the Arizona Medical Board and/or its agency and the higher Arizona Courts did not follow the supreme law of the land that regulates the operation and administration of said board and/or its agency, these Court Decisions cannot stand.

One cannot break the law in an attempt to "uphold the law".

An agency of the government must scrupulously observe rules, regulations or procedures which have been established. When it fails to do so, its action cannot stand and courts will strike it down. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 98 L.Ed. 681; *United States v. Heffner*, 420 F.2d 809;

*Service v. Dulles*, 1 L.Ed.2d 1403; *Nelson v. I.N.S.*, 232 F.3d 258.

THEREFORE, IT IS demanded that the Order concerning the status of this case and the standard of proof or review be reconciled with the true law.

Again, in *Washington State Department of Health v. Ongom*, supra, the U.S. Supreme Court reviewed the states that have adopted the clear, cogent and convincing evidence rule.

> "Ten states that use 'clear and convincing evidence' or its equivalent do so under the common law. See *Storrs v. State Med. Bd.*, 664 P.2d 547, 555 (Alaska 1983), but see *In re Robson*, 575 P.2d 771 (Alaska 1978) (standard of proof for attorney discipline is preponderance of evidence); *Silva v. Superior Ct.*, 14 Cal. App. 4th 562, 17 Cal. Rptr. 2d 577, 582 (1993) (struck down preponderance of evidence standard of proof based on statutory analysis); *Cooper v. Bd. of Profl. Discipline*, 4 P.3d 561, 568 (Idaho 2000); *Schireson v. Walsh*, 187 N.E. 921, 923 (Ill. 1933) ('clearly and conclusively'); *Allen v. Louisiana Bd. of Dentistry*, 531 So. 2d 787, 798 (La. Ct. App. 1988), rev'd on other grounds, 543 So. 2d 908 (La. 1989); *McFadden v. Mississippi Bd. of Licensure*, 735 So. 2d 145, 152 (Miss. 1999); *Davis v. Wright*, 503 N.W.2d 814, 818 (Neb. 1993) (struck down preponderance of evidence standard on equal protection grounds); *In re Zar*, 434 N.W.2d 598, 602 (S.D. 1989) (making exception to

> preponderance standard in administrative hearings for license revocations because of important interest involved); *Clark v. West Virginia Bd. of Med.*, 508 S.E.2d 111, 121 (W. Va. 1998) (where licensee charged with fraudulently obtaining license). Although a specific authority on point could not be found, it is presumed that the clear and convincing evidence standard is used in Indiana."

The Arizona Medical Board caused unjust discrimination against this medical practitioner concerning fundamental and foundational principles of due process and equal protection under the law.

> "When administrative bodies promulgate rules or regulations to serve as guidelines these guidelines should be followed. Failure to follow such guidelines tends to cause unjust discrimination and deny adequate notice contrary to fundamental concepts of fair play and due process". *JLRB v. Welcome-American Fertilizer Co.*, 443 F.2d 19 at 20 (9th Cir. 1971); *International House v. N.L.R.B.*, 676 F.2d 906 (1982).

The Arizona Medical Board discriminated against the Petitioner/nutritional-medical practitioner in this case because no other medical practitioner in the U.S. has been legally subjected to the following denial of due process and equal protection rights concerning, but not limited to, the following violations of principles established by the U.S. Supreme Court throughout the U.S.

The legal principle is that in administrative proceedings, the status of the case must be quasi-criminal and the standard of proof or review must be clear and convincing evidence where sanctions are severe, involving the loss of license, etc., established by the U.S. Supreme Court several years ago. *Greene v. McElroy*, 360 U.S. 474 at 496-97 (U.S. 1959); *Goldberg v. Kelly*, 25 L.Ed.2d 287 at 300, 397 U.S. 254 (U.S.N.Y. 1970); *Boyd v. United States*, 116 U.S. 616 at 634 (U.S. 1886); *In re Ruffalo*, 390 U.S. 544 at 551 (U.S.Ohio 1968); *Addington v. Texas*, 441 U.S. 418 (U.S.Tex. 1979); *Woodby v. INS*, 385 U.S. 276 at 285 (U.S.N.Y. 1966); *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (U.S.Va. 1976); *United States v. Ward*, 448 U.S. 242 (U.S.Okl. 1980).

Again, several years ago, the U.S. Supreme Court had ruled by the full court that when there are severe sanctions, such as losing a license to practice your profession, etc., that the status of the case is quasi-criminal, with a standard of review or proof of clear and convincing evidence. When these U.S. Supreme Court cases were argued before medical board proceedings, the board attorney always argued that those cases did not apply to the medical profession. Also, in the case of *Washington State Department of Health v. Ongom*, it should have applied the previous principle of the U.S. Supreme Court to the medical profession. *Washington State Department of Health v. Ongom*, 127 S.Ct. 2115, in April 2007.

The U.S. Supreme Court has spoken concerning the issues involved in this instant case while it was

pending. The Honorable Medical Board, and all the layers of the Arizona Courts above it, have refused to recognize and/or follow the rulings of the U.S. Supreme Court, in violation of the rule of law.

## I. THE EQUAL PROTECTION OF THE LAWS CLAIM

In considering equal protection of the laws, the guiding principle is often stated as requiring that all persons be treated alike under like circumstances and conditions. *Alexander v. Witman*, 114 F.3d 1392 (3rd Cir. 1997), cert. denied, 118 S.Ct. 367, 139 L.Ed.2d 286 (U.S. 1997). Other practitioners similarly situated enjoy the protection of the Court decisions upholding the same.

The Petitioner in this case has demonstrated that, without the due process and equal protection afforded by law, his property/license to practice will be erroneously and illegally taken from him.

The equal protection of the laws clause was designed to prevent any person from being singled out as a special subject of discrimination. *Pembina Consol. Silver Mining & Milling Co. v. Com. of Pennsylvania*, 125 U.S. 181 (1888).

Plaintiff need not be a member of a traditionally protected class in order to allege equal protection violation, but rather a "class of one" may maintain an equal protection claim, as long as plaintiff alleges

that he was treated differently than similarly situated persons, and that different treatment was intentional and had no rational basis. *Tuskowski v. Griffin*, 359 F. Supp. 2d 225 (D. Conn. 2005). Because the Fifth Amendment imposes on the federal government the same standard required of state legislation by the Equal Protection Clause of the Fourteenth Amendment, *Schweiker v. Wilson*, 450 U.S. 221, 226 n. 6, 101 S.Ct. 1074, 1079 n. 6, 67 L.Ed.2d 186 (1981), the Due Process Clause of the Fifth Amendment has an "implied equal protection guarantee." *Federal Communications Commission v. Beach Communications, Inc.*, 508 U.S. 307 at 312, 113 S.Ct. 2096 (1993).

Therefore, the Equal Protection clause of the Fourteenth Amendment also applies equally to the Federal government. The Equal Protection Clause of the Fourteenth Amendment "announces a fundamental principle: the State or Federal government must govern impartially," *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587, 99 S.Ct. 1355, 1367, 59 L.Ed.2d 587 (1979), and "directs that all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 561-62, 64 L.Ed. 989 (1920). Therefore, "[general] rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply" with the Equal Protection Clause. *New York City Transit Authority v. Beazer*, 440 U.S. at 587, 99 S.Ct. at 1366-67 (1979).

In the present case, there is an underlying federal right, the right to have the laws applied equally to the Nutritional-Medical Practitioner concerning the necessary legal procedures. *Buckley v. Valeo*, 424 U.S. 1 (1976).

## II. THE DUE PROCESS CLAIM

The Due Process Clause not only requires that the government follow appropriate procedures when it seeks to "deprive any person of life, liberty or property," it also prevents "certain government actions, regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986). Thus, the Due Process Clause has a substantive component which guarantees that "all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States or the Federal government." *Planned Parenthood of Southeastern Pennsylvania v. Casey v. Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. 833, 847, 112 S.Ct. 2791, 2804 (1992) [quoting *Whitney v. California*, 274 U.S. 357, 373, 47 S.Ct. 641, 647, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring)]. Although the "outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects" have not been defined, Id., at 848, 112 S.Ct. at 2805, certain protected liberties fall within the ambit of protection. Thus, those to whom the Amendment applies have a right to be free from bodily restraint but also the right . . . to contract, to engage in any of the common occupations of

life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of [their] own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men. *Board of Regents v. Roth*, 408 U.S. 564, 572, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626-27, 67 L.Ed. 1042 (1923) (Emphasis added).

The Petitioner in this case is only asking for the right not to be discriminated against and to be able to enjoy the privileges of the protection of the law involving the fact that governmental agencies must follow previously-mandated procedures by hierarchically-higher courts.

## CONCLUSION

This Petition for Writ of Mandamus must be granted and the Orders of the Arizona Courts must be abated because they did not take into account the quasi-criminal status and the standard of review or proof being clear and convincing evidence in this case.

Respectfully submitted,

October 8, 2008
Date

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CHIEF DEPUTY CLERK

September 24, 2008

**RE: JOHN V DOMMISSE MD v HON. MIHALSKY/ AZ MEDICAL BRD**
Arizona Supreme Court No. CV-08-0231-SA
Court of Appeals Division One No. 1 CA-SA 08-0162
Maricopa County Superior
Court No. LC2008-000345-001 DT

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on September 23, 2008, in regard to the above-referenced cause:

**ORDERED: The Court declines to accept jurisdiction of the Petition for Special Action.**

**FURTHER ORDERED: Request for Attorneys' Fees & Costs [Respondent/Real Parties in Interest Arizona Medical Board] = GRANTED.**

Rachelle M. Resnick, Clerk

TO:
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Michael W Sillyman, Kutak Rock LLP
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